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No. 91-761

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

THE PENN CENTRAL CORPORATION,

*Petitioner,*

vs.

UNITED STATES OF AMERICA, CONSOLIDATED RAIL CORPORATION and SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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Dated: November 8, 1991

## QUESTION PRESENTED

Whether the Third Circuit's decision to permit CERCLA claims against a reorganized company, eight years after the Consummation Order, when the claims are predicated solely on polluting acts that took place before the Consummation Order, undermines Congressional policies of finality and fresh start expressly provided in the bankruptcy laws?

## PARTIES TO THE PROCEEDING

The names of all parties to the proceedings in the Third Circuit Court of Appeals appear in the caption of the case.

## STATEMENT REQUIRED BY RULE 29.1

The non-wholly owned subsidiaries of The Penn Central Corporation are DI Industries, Inc., Multiway Industries (HK) LTD., Carol Cable Limited, Casualty Underwriters, Inc., Detroit Manufacturers Railroad Company, The New York and Harlem Railroad Company, Pennsylvania-Reading Seashore Lines, and Pittsburgh and Cross Creek Railroad Company. The parent company of The Penn Central Corporation is American Financial Corporation.

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*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner The Penn Central Corporation ("PCC") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 19, 1991.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix ("App.") *infra*, A1-16) is not yet reported. The district court's Memorandum and Order No. 4331, entered August 10, 1990 (App. A17-24), is unofficially reported at [1990-1991 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 73,594 (E.D. Pa.). Memorandum and Order No. 4311 of the district court, entered January 15, 1988 (App. A25-41), is reported at 92 B.R. 605 (E.D. Pa.).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on September 19, 1991. This petition is filed within 90 days of that date.

The Third Circuit, by order entered October 18, 1991, stayed issuance of the certified judgment in lieu of formal mandate until November 9, 1991, pending the filing by PCC of a petition for writ of certiorari.

## PROVISIONS OF STATUTES INVOLVED

Section 77(b) of the Bankruptcy Act of 1898, 11 U.S.C. § 205(b) (repealed 1978), provides, in pertinent part:

> The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this title. . . .
>
> • • •
>
> The term "claims" includes debts, whether liquidated or unliquidated, securities. . . , liens, or other interests of whatever character.

Section 77(f) of that Act provides, in pertinent part:

> Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, . . . be binding upon the debtor, all stockholders thereof, . . . and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.
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> • • •
>
> The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan.

## STATEMENT OF THE CASE

This case arises out of the bankruptcy reorganization of Penn Central Transportation Company ("PCTC"), whose plan of reorganization was consummated over twelve years ago. The Third Circuit reversed a decision of the district court and permitted the prosecution of environmental cleanup claims against PCC, the reorganized company which emerged in 1978 from the PCTC bankruptcy proceedings. The claims were grounded solely upon alleged actions of the debtor PCTC years prior to consummation of the reorganization.

The factual basis for the claims is alleged polychlorinated biphenyl ("PCB") contamination of the Paoli Railroad Yard which PCTC owned and operated until 1976 when it was conveyed to Consolidated Rail Corporation ("Conrail"). Eight years after the district court in the PCTC reorganization proceedings

entered its order confirming the Penn Central plan of reorganization, and ten years after PCTC's ownership interest in the Yard ended, the United States, Conrail and Southeastern Pennsylvania Transportation Authority ("SEPTA") petitioned for leave of the district court to bring claims against PCC under the 1980 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*. The district court denied those petitions, relying upon the language of § 77(f) of the Bankruptcy Act, the provisions of the 1978 Consummation Order which discharged, barred and enjoined all claims not covered by the plan, and fundamental principles of finality under bankruptcy law. The Third Circuit, in holding that the district court erred as a matter of law in not permitting prosecution of the CERCLA claims against PCC, applied and further extended an "exception" to the bankruptcy rule of finality which it had developed in a trilogy of decisions[1] limiting the scope of claims subject to bankruptcy proceedings.

### A. The 1970-78 Proceedings in the Penn Central Reorganization Which Disposed of All Claims Against the Debtor Pursuant to § 77 of the Bankruptcy Act.

The PCTC reorganization proceedings continued from 1970 until 1978 when its Plan of Reorganization was approved and confirmed. That Plan has long since been consummated. It covered tens of thousands of claims, and disposed of them with finality. In accordance with the mandate of § 77(f) of the Bankruptcy Act, the Plan directed that "[t]he property dealt with by the Plan, when vested in the Reorganized Company, . . . will be free and clear of all claims of the Debtor, its creditors . . .

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[1] The trilogy of cases in which the Third Circuit has carved out "exceptions" to claims covered in bankruptcy proceedings are: *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); and *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988). The Third Circuit's rationale for these decisions has been rejected or criticized by courts in several circuits. *See infra* pp. 15-17.

and all other persons, unless otherwise specifically provided in the Plan, and the Debtor will be discharged from its debts and liabilities." R. 1085a.[2] The numerous creditors and security holders of the debtor PCTC had voted to accept the compromises and allocation of the assets of the debtor's estate as provided in the Plan in final disposition and settlement of their claims. The district court entered its Consummation Order and Final Decree effective October 24, 1978.

Pursuant to the statutory directives of § 77(f), that Order broadly discharged and forever barred all possible claims of whatever type based upon acts of the bankrupt debtor PCTC. To effectuate and protect the Plan, all persons were enjoined from bringing suits against PCC "on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, . . . may have in, to or against" the debtor PCTC. R. 1107a.

At the time the Plan was confirmed and the Consummation Order entered, it seemed clear to all concerned that the disposition of all claims against the debtor PCTC as provided in those instruments would be the end of the matter. As found by the district court which presided over the reorganization proceedings for eight years:

> There can be no doubt that the Consummation Order was intended to exonerate PCC from all claims in the categories of claims now being asserted in this proceeding. In accordance with normal bankruptcy practice, the reorganized company was to start with a clean slate, with only such liabilities and responsibilities as were inherent in the carefully structured Plan of Reorganization. And the Plan, in turn, was intended to achieve the compromise adjustment of a host of conflicting claims, giving to each its proper place in conformity with the absolute priority rule. The participants in the Plan proceedings would have

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[2] "R." denotes a citation to the record before the Third Circuit Court of Appeals.

> been astonished to learn that there was or could be any group of claimants whose entitlements were not dealt with in or disposed of by the plan, and might survive the Consummation Order.

App. A31.

The United States, Conrail and SEPTA each appeared and participated in the PCTC bankruptcy proceedings. As parties to those proceedings, they were bound by the provisions of the Plan and the adjudications and directives of the Consummation Order which effectuated the disposition of claims in the reorganization. Early on in the proceedings, the district court had granted the government's petition to intervene generally. R. 1025a-30a. Thereafter, the government actively participated through its various agencies and, in the end, supported the proposed Plan of Reorganization. R. 172a; *In re Penn Central Transportation Co.*, 596 F.2d 1127, 1137 (3d Cir.), *cert. denied*, 444 U.S. 834 (1979). Conrail and SEPTA had also intervened and participated in the reorganization proceedings. R. 1042a-46a; 1087a-88a; *see also In re Penn Central Transportation Co.*, 458 F. Supp. 1357, 1362-63 (E.D. Pa. 1978).

### B. The Operative Facts as to the PCB Contamination at Paoli Yard Upon Which the United States, Conrail and SEPTA Were Permitted by the Third Circuit to Assert Claims Against PCC.

The factual basis for the claims in this case is PCB contamination at the Paoli Railroad Yard prior to April 1976. The Yard was formerly owned and operated by PCTC and its predecessors. Railroad cars with transformers containing PCBs were used at the Yard over an extended period of time.

PCTC's ownership and operation of Paoli Yard ended during the course of the reorganization proceedings, and over two years prior to the entry of the Consummation Order, when on April 1, 1976 pursuant to the Congressional directives of the Regional Rail Reorganization Act of 1973 ("Rail Act"), 45 U.S.C. § 701 *et*

*seq.*, essentially all of PCTC's rail-related properties, including Paoli Yard, were transferred in an "as is" condition to Conrail. Conrail immediately transferred the Paoli Yard to National Railroad Passenger Corporation ("AMTRAK"), the present owner, although pursuant to an agreement with SEPTA, Conrail continued to operate commuter services at the Yard. R. 160a-61a. In 1983, SEPTA assumed responsibility for these commuter operations. R. 161a.

By the time PCTC filed its petition for bankruptcy reorganization, PCBs had been released at Paoli Yard for over thirty years. App. A25. It is undisputed that during the course of the PCTC reorganization proceedings, the contaminated condition of Paoli Yard was "visible" and "manifest," and "the existence of a PCB problem was certainly known to both sides." App. A22, A36.

Despite its extensive involvement in the PCTC bankruptcy, the government never raised any question about PCB contamination at Paoli Yard or elsewhere. The government never asserted any claim with respect to such contamination and the PCB problem never "surfaced in the course of the bankruptcy litigation process." App. A26. Accordingly, no provision was made in the PCTC Plan of Reorganization for payment of environmental claims such as for the cleanup of Paoli Yard.

C. *The Proceedings Below.*

1. *In the District Court*

In May of 1986, petitions were filed in the district court seeking an exemption or other relief from the anti-suit injunction of section 7.02 of the 1978 Consummation Order to permit the assertion of environmental claims against PCC based on the PCB contamination of Paoli Yard by PCTC in the period prior to the transfer of the Yard to Conrail in 1976. All petitions were before the Honorable John Fullam, the presiding judge for eight years in the PCTC reorganization proceedings, who had retained jurisdiction under section 7.04 of the Final Decree in order to protect the effectuation of the Plan of Reorganization. The

government's petition sought injunctive relief and reimbursement for cleanup expenses at Paoli Yard based upon sections 104, 106(a) and 107 of the 1980 CERCLA Act, 42 U.S.C. §§ 9604, 9606(a) and 9607. R. 156a-57a; 1347a-61a. SEPTA and Conrail filed petitions seeking leave to assert contribution claims against PCC flowing from, *inter alia*, a pending government CERCLA action against them to pay remediation costs at Paoli Yard. R. 55a-80a; 158a-65a.

The district court issued two decisions, an interim decision entered January 15, 1988 (App. A25-41), and its final decision and order entered August 10, 1990 in which it denied the petitions for leave to prosecute environmental cleanup claims against PCC alleged to arise from activities of the debtor PCTC prior to the date in 1978 of the Consummation Order (App. A17-24). The district court concluded that denial of the petitions was required by provisions of the Consummation Order and Final Decree discharging the debtor of all liability and claims, transferring the property of the debtor to PCC "free and clear" of all claims against the debtor, and enjoining the prosecution of claims based upon acts of the debtor. App. A20. Those provisions, in the view of the district court, were grounded upon the directives of § 77(f), as well as the "all-inclusive definitions" in the statute of "claims" and "creditors." App. A19-20. Judge Fullam in concluding that the petitions must be denied pointed out that "[o]nce a reorganization plan has been confirmed and consummated, it cannot be amended." App. A21. "[U]nless a different result" were compelled by application of the rationale of the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (hereinafter "*Schweitzer*"), the claims "would undoubtedly be precluded by the terms of the Consummation Order and firmly established principles of bankruptcy law." App. A19. The district court concluded that granting the exemptions sought by the petitioners on the basis of the exception established by *Schweitzer* would give that decision an "unduly broad reading," and would be at odds with other Third Circuit decisions, as well as with decisions from other jurisdictions. App. A21.

2. *In the Court of Appeals*

The Third Circuit reversed. App. A4-16. It concluded that the district court erred as a matter of law and that the government, Conrail and SEPTA should be permitted to assert their alleged CERCLA environmental cleanup claims against the reorganized company PCC. App. A5. The Third Circuit's decision was not grounded upon the application of accepted principles of statutory construction to the language of § 77 pursuant to which PCTC was reorganized, the Plan formulated and the Consummation Order entered. Nor was it based upon an analysis of the statutory language or legislative history of CERCLA under which the claims were sought to be asserted. On the contrary, the Third Circuit relied upon and extended an "exception" to the rule of finality which it had carved out in *Schweitzer*, and later elaborated in *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988) (hereinafter "*Zulkowski*"), and which was based upon the narrow definition of a bankruptcy "claim" that it had adopted in *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (hereinafter "*Frenville*"). App. A9-13. Thus the court found that, based upon the rationale developed in its earlier precedents, the government, Conrail and SEPTA had neither "causes of action" nor a "legal relationship" sufficient to support contingent "claims" encompassed by the PCTC discharge:

> [O]ur decision in *Schweitzer* leads us to the conclusion that the petitioners' asserted claims under CERCLA did not constitute dischargeable claims within the meaning of section 77 and thus survive the discharge of the debtor.

App. A11. The Third Circuit concluded that because of its holding that the CERCLA claims had not been discharged under the principles it had adopted in its *Frenville*, *Schweitzer* and *Zulkowski* rulings, such claims could be asserted against the reorganized company PCC and, if meritorious, "PCC will bear the CERCLA costs." App. A13.

## REASONS FOR GRANTING THE WRIT

### Summary

The Third Circuit has adopted exceptions for certain types of claims to the principle of finality in bankruptcy proceedings as mandated by provisions of the bankruptcy laws. It has extended those exceptions in its decision below to permit the assertion of environmental claims against a reorganized company based exclusively upon the pre-consummation acts of the bankrupt debtor. That ruling, in effect, emasculates the protection and right to a "fresh start" afforded a reorganized company by the bankruptcy laws. The legal rationale the Third Circuit has employed for this "exception" involves limiting — by concepts sounding in "cause of action" and "legal relationship" — the statutory definition of "claim," which this Court has said is so "sweeping" and "all-inclusive" that it "leave[s] room for no exception." *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947). There is no basis in the statutes, nor in the decisions of this Court, to support such judicially created exceptions. Whether exceptions should be adopted must be left with Congress. *Ohio v. Kovacs*, 469 U.S. 274, 278-79 (1985). Moreover, the effect of the Third Circuit's decision is to modify, years after the fact, rights and immunities established by court orders and adjudications properly entered in a prior bankruptcy proceeding, pursuant to provisions of a bankruptcy statute that permit no modification.

Substantially irreconcilable decisions as to the disposition of environmental-type claims in bankruptcy proceedings have been recently rendered by the Second and Third Circuits in two significant bankruptcy reorganizations involving the LTV Corporation and Penn Central Transportation Company. The Second Circuit's decision, and the decisions of courts in seven other circuits, including two recent decisions from the Ninth Circuit Bankruptcy Appellate Panel, reject the Third Circuit's approach — that only it has seen fit to adopt — of limiting by "exception" the scope of "claims" encompassed in bankruptcy proceedings.

The issues raised by this petition are significant and important. In the words of the Second Circuit in its recent decision in the *LTV* case, these are "important issues at the intersection of bankruptcy law and environmental law." *In re Chateaugay Corp.*, No. 90-5024, *et al.*, slip op. at 3 (2d Cir. Sept. 6, 1991) (hereinafter "*LTV*"). They are also ripe for adjudication by this Court now.

## I. *The Third Circuit's Narrow Definition Of "Claim" Undermines The Protection And Fresh Start Afforded By Congress To A Reorganized Company By Creating An Exception To The Rule Of Finality.*

The Third Circuit framed the issue in this case as whether it should "carve out" an " 'exception' to finality" so as to permit the assertion of claims against PCC many years after PCTC's discharge in bankruptcy. App. A9. In answering that question "yes" and adopting an "exception" for environmental claims, the Third Circuit turned its back on basic bankruptcy principles as incorporated in § 77 and as underscored by this Court in prior decisions under that statute and other bankruptcy laws.[3]

The Third Circuit's "exception" theory, which employs limiting concepts of "cause of action" and "legal relationship," conflicts in principle with this Court's decision in *Gardner v. New Jersey*, *supra*. That case presented important issues under § 77 of the Bankruptcy Act, including the scope of "claims" Congress

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[3] The Third Circuit did not, and could not, cite to or rely upon anything in the CERCLA statute or its legislative history as supporting its result. In any event, basic principles of statutory construction dictate that if Congress had intended CERCLA to have such a drastic impact on the bankruptcy laws, that intention must appear in an explicit and unambiguous fashion in the statute. *See Traynor v. Turnage*, 485 U.S. 535, 547 (1988) (it is a " 'cardinal rule' . . . that repeals by implication are not favored"); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (same); *In re Jensen*, 127 B.R. 27, 33 (Bankr. 9th Cir. May 15, 1991) ("Environmental policy considerations may not control the Bankruptcy Code in the absence of clear legislative intent.").

intended to be covered by the statute. 329 U.S. at 568. In finding that the tax claims of New Jersey were "claims" within the meaning of § 77, the Court determined that:

> [T]he sweeping, all-inclusive definitions of "claims" and "creditors" in § 77 leave room for no exception under [the law].

*Id.* at 573. Since *Gardner*, this Court has consistently recognized the broad sweep Congress intended to give to the scope of discharge of claims in bankruptcy proceedings. The thrust of this Court's decisions in that area is consistent and clear; there is no place for judicially created "exceptions" and, if any exceptions are to be made, Congress should make them.

That principle was resoundingly confirmed in *Ohio v. Kovacs*, *supra*, a case under the Bankruptcy Code, in which this Court rejected Ohio's argument that its injunction ordering the cleanup of a hazardous waste site by a party who subsequently filed for bankruptcy was not a dischargeable claim within the meaning of the bankruptcy laws: "[I]t is apparent that Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision . . . when it desired to do so." 469 U.S. at 279. Except for specifically identified exceptions in the statute, "a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy." *Id.* at 278.[4] *See also Johnson v. Home State Bank*, __ U.S. __, 111 S. Ct. 2150, 2154 (1991) ("Congress intended by [the] language [in the statute] to adopt the broadest available definition of 'claim' "); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, __ U.S. __, 110 S. Ct. 2126, 2130 (1990) ("Congress chose expansive language" in its definition

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[4] The scope of "claims" covered by the Code and § 77 is substantially broader than the scope of claims covered by the old Act, which employed concepts of "provability" and "allowability." *See* § 63(a) of the Bankruptcy Act; *see also* 5 *Collier on Bankruptcy* § 77.20 (14th ed. 1978) (generally § 63(a) is inapplicable to § 77 reorganizations). As underscored by this Court in *Gardner* and *Kovacs*, in both § 77 and the Code, Congress clearly intended to give the broadest possible definition and scope to the "claims" covered by those acts.

of claim), *later overruled by statute*, Criminal Victims Protection Act of 1990, § 3, Pub. L. No. 101-581, 104 Stat. 2865.

The Third Circuit's exception for certain environmental claims flies in the teeth of statutory directives which Congress could not have expressed in any clearer terms. Thus, § 77(f) provides that upon confirmation by the court of a plan of reorganization the debtor's property transferred as part of the plan "shall be" conveyed "free and clear of all claims of the debtor, its stockholders and creditors" and that, except as otherwise provided in the plan, "the debtor shall be discharged from its debts and liabilities." According to the express language of § 77(f) the only exceptions "shall be" those "reserved in the order confirming the plan."

The fundamental bankruptcy principles incorporated by Congress in the provisions of § 77 have been repeatedly recognized and affirmed. A confirmed and consummated plan cannot be amended. Pub. L. No. 478, 62 Stat. 162 (1948) (a § 77 plan of reorganization can only be modified due to changed circumstances and only before final confirmation of the plan). *See also Duryee v. Erie R.R.*, 175 F.2d 58, 63 (6th Cir. 1949) ("the purpose of the bankruptcy law . . . and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute"); *Duebler v. Sherneth Corp.*, 160 F.2d 472, 474 (2d Cir. 1947); *In re Peyton Realty Co.*, 148 F.2d 771, 773 (3d Cir. 1945). Moreover, the orders confirming and consummating a plan of reorganization are to be accorded *res judicata* effect. *New Haven Inclusion Cases*, 399 U.S. 392, 480-81 (1970); *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

The Third Circuit's disregard of the clear language of § 77(b) and § 77(f) and these fundamental principles is expressly what this Court has said should not be done in the face of clear, unambiguous Congressional intent as manifested in a bankruptcy statute. In *Pennsylvania Dep't of Pub. Welfare v. Davenport*, *supra*, this Court held that restitution obligations incurred as a result of welfare fraud were "debts" within the meaning of the Code, and therefore dischargeable claims in a chapter 13

case, because Congress intended the broadest possible definition of "debt." 110 S.Ct. at 2133. "[A]bsent a clear indication that Congress intended" a departure from past bankruptcy practice, the Court "refus[ed] to carve out a broad judicial exception to discharge for restitution orders." *Id. See also Toibb v. Radloff*, __ U.S. __, 111 S. Ct. 2197, 2199 (1991) ("The Code contains no ongoing business requirement for reorganization under Chapter 11, and we are loathe to infer the exclusion of certain classes of debtors from the protections of Chapter 11. . .").

## II. *The Third Circuit's Decision In This Case Is In Conflict In Principle And Result With The Recent LTV Decision Of The Second Circuit.*

The Third Circuit's *Penn Central* decision reached the opposite result from the Second Circuit in *In re Chateaugay Corp.* ("*LTV*") on the question of whether environmental cleanup claims based upon the pre-petition polluting activities of the debtor were dischargeable claims in bankruptcy reorganization. The *LTV* case, decided September 6, 1991, arose out of the chapter 11 reorganization of the LTV Corporation, and raised the issue of whether cleanup costs incurred by the government under CERCLA "are pre-petition 'claims,' dischargeable in bankruptcy, regardless of when such costs are incurred, as long as they concern a release or threatened release of hazardous substances that occurred before the debtor filed its Chapter 11 petition." Slip op. at 3-4.

The Second Circuit affirmed the district court's definition of "claim" for purposes of bankruptcy discharge to include environmental claims based upon pre-petition releases or threatened releases of hazardous substances. *Id.* at 19. Both the district court and the Second Circuit rejected the narrow definition of "claim" urged by the government, which would have had the effect of exempting from discharge all cleanup claims in instances where the government had not yet incurred response costs under CERCLA. The government had cited to and based its position on the Third Circuit's decision in *Schweitzer, supra*, 758 F.2d at 942, in which that Court determined that plaintiffs' future asbestosis causes of actions were not discharged in bankruptcy because there had not yet been any manifestation of injury –

*i.e.*, the injury at that time was insufficient "to sustain a cause of action under generally applicable principles of tort law." *See LTV*, 112 B.R. 513, 522 n.15 (S.D.N.Y. 1990) (the government relies upon cases "which required provability of a claim").

Two weeks later the Third Circuit in deciding this case accepted the government's contention, advanced unsuccessfully in *LTV* in the Southern District of New York and the Second Circuit, that all the elements of a "cause of action" must be present for a "claim" to be discharged. App. A11, A12. The two appellate results are irreconcilable with respect to the dischargeability of claims based upon the release or threatened release of hazardous wastes prior to the filing of a petition in bankruptcy. In the Second Circuit, any "claims" based upon that pre-petition release are discharged and barred by the bankruptcy proceeding. In the Third Circuit, unless the essential elements of the cause of action are present prior to consummation, no dischargeable claim exists, and an action based upon the prepetition release of hazardous wastes may be pursued at a future time against the reorganized company.

## III. *Courts In Several Other Circuits Have Rejected Or Criticized The Basic Rationale For The Third Circuit's Decision Which Engrafts Limiting Concepts Of "Cause Of Action" And "Legal Relationship" Onto The Scope Of Claims Subject To Bankruptcy Proceedings.*

The Third Circuit in this case substantially broadened the judicially created "exception" to finality in bankruptcy it had created in its 1985 decision in *Schweitzer*, which in turn was based upon its 1984 *Frenville* decision, notwithstanding that the Third Circuit's legal rationale developed in those decisions has been sharply, and nearly uniformly, criticized or rejected by courts and commentators.

The district court in *LTV* explicitly rejected the holding in *Schweitzer* because it was based upon the inapposite requirement that only "provable" claims could be discharged. 112 B.R. at 522 n.15. The Second Circuit, although not specifically critical of

*Schweitzer* and *Frenville*, found that "the District Court properly applied the Bankruptcy Code's definition of 'claim'." Slip op. at 19. The *LTV* decision is consistent with the long standing and wide disapproval by courts in the Second Circuit of the *Schweitzer* and *Frenville* decisions.[5]

The Fourth Circuit has also rejected the Third Circuit's highly restrictive interpretation of a bankruptcy "claim." In *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988), the court considered when a toxic tort claim arose for purposes of the automatic stay provision of the Code. The plaintiff had used the debtor's Dalkon Shield product prior to the filing of the petition for reorganization, but the harm caused by the product did not manifest itself until after the debtor's filing. The Fourth Circuit held that plaintiff's civil action was stayed because plaintiff's claim arose pre-petition, *i.e.*, at the time the product was used. 839 F.2d at 203. In so doing the court analyzed and rejected as unsound the *Frenville* decision and its "limiting definition of claim." *Id.* at 201. Instead the Fourth Circuit interpreted "claim" broadly, based upon the words of the statute, and as confirmed by this Court's interpretation of "claim" in *Ohio v. Kovacs*, *supra*. *Id.* at 202-03. *See also In re A.H. Robins Co.*, 63 B.R. 986, 990 (Bankr. E.D. Va. 1986) (Judge Merhige rejected the *Frenville* definition of claim as "questionable" and declined "to embrace the *Frenville* error"), *aff'd*, 839 F.2d 198, *supra*.

Most recently, two Ninth Circuit Bankruptcy Appellate Panels have rejected the Third Circuit's limited interpretation of "claim." In *In re Jensen*, 127 B.R. 27 (Bankr. 9th Cir. May 15,

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[5] *See In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 348 n.4 (2d Cir. 1985) ("We are not as certain as the District Court that . . . we would follow *Frenville*"); *In re Johns-Manville Corp.*, 57 B.R. 680, 688, 689, 690 (Bankr. S.D.N.Y. 1986) (*Frenville's* "strained, narrow analysis limits by judicial fiat a broad, legislatively-mandated definition of the term 'claim' "; its rationale "ignores congressional intent" and "distorts the underlying policies of the Code in equating a claim with a cause of action"); *see also In re Amfesco Indus., Inc.*, 81 B.R. 777, 781-83 (Bankr. E.D.N.Y. 1988); *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 497-98 (Bankr. E.D.N.Y. 1986); *In re Johns-Manville Corp.*, 68 B.R. 618, 628 (Bankr. S.D.N.Y. 1986), *aff'd on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom., Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

1991), *appeal docketed*, No. 15879 (9th Cir. June 3, 1991), the Bankruptcy Appellate Panel held that environmental cleanup claims based upon the release of hazardous waste pre-petition are discharged in bankruptcy. That court rejected the theory of the California Health Department, which the court described as based upon *Frenville*, that its claim arose only after it had a right to payment on its CERCLA cause of action. *Id.* at 30. The *Frenville* interpretation of "claim" is "unwarranted" from a reading of the statute and contrary to the overriding goal of the bankruptcy laws of providing a "fresh start" to the debtor. *Id.* at 31 (*citing Grogan v. Garner*, __ U.S. __, 111 S. Ct. 654 (1991)). The court instead adopted the interpretation of "claim" from the *LTV* case and held that "the bankruptcy claim arises upon the conduct by the debtor which would give rise to a cause of action, if other elements may later be satisfied," a rule which "most closely reflects legislative intent and finds the most support in the case law." *Id.* at 32-33.

Five days after the *Jensen* decision, a different bankruptcy appellate panel from the Ninth Circuit also rejected the Third Circuit's narrow *Frenville* definition of "claim" in favor of a broader definition to conclude that "contribution and indemnification claims arise at the 'time when the acts giving rise to the alleged liability were performed,' and not when the claims technically accrue under state law." *In re Buckenmaier*, 127 B.R. 233, 238 (Bankr. 9th Cir. May 20, 1991) (citations omitted).

District courts and bankruptcy courts in the Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have been similarly critical of the Third Circuit's limited definition of "claim." *See, e.g., In re Edge*, 60 B.R. 690, 704 (Bankr. M.D. Tenn. 1986) ("*Schweitzer* and *Frenville* confuse the existence of a present right of action or access to the courts with the existence of a 'claim' for bankruptcy purposes.").[6] Commentators have also been

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[6] *See also*: *Sixth - In re Erie Lackawanna Ry.*, No. B72-2838, slip op. at 11 (N.D. Ohio) ("the Third Circuit literally read into the Section 77 definitions of 'claim' and 'creditor' the provability and 'right to payment' requirement

*(Footnote continued)*

critical of the Third Circuit's decisions in this area,[7] and at one time the National Bankruptcy Conference considered proposing amendments to the Code to overrule *Frenville*, but "it did not appear to be a matter of urgency" because "the *Frenville* case was not being followed" (National Bankruptcy Conference, *Summary of Proceedings of Annual Meeting of 1988*, 7 (1989)).

## IV. *The Third Circuit's Decision Raises Important Questions Of Federal Law Which Should Be Settled Without Delay.*

The bankruptcy laws should apply uniformly throughout the country. U.S. Const. art. I, § 8, cl. 4. If the Penn Central reorganization had proceeded in the Second, Fourth, Sixth or circuits other than the Third, it is probable that the reorganized company would have been protected against claims such as the environmental cleanup claims at issue here, and that the

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that had been expressly deleted from those definitions"), *aff'd on other grounds*, 803 F.2d 881 (6th Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987); *In re Baldwin-United Corp.*, 48 B.R. 901, 903, 904 (Bankr. S.D. Ohio 1985). *Seventh - In re Diamond Mortgage Corp.*, 105 B.R. 876, 878 n.4 (Bankr. N.D. Ill. 1989). *Eighth - In re Transp. Sys. Int'l*, 110 B.R. 888, 894 (D. Minn. 1990), *aff'd on other grounds*, 930 F.2d 625 (8th Cir. 1991); *In re Wisconsin Barge Lines, Inc.*, 91 B.R. 65, 68 (Bankr. E.D. Mo. 1988); *but see United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990) (adopting the legal relationship test of *Frenville*, without citing to the *Frenville* decision). *Tenth - In re Storage Technology Corp.*, 117 B.R. 610, 625 (Bankr. D. Colo. 1990); *In re Grynberg*, 113 B.R. 709, 712 (Bankr. D. Colo 1990); *In re Black*, 70 B.R. 645, 648-50 (Bankr. D. Utah 1986). *Eleventh - In re Murray Indus., Inc.*, 110 B.R. 585, 588 (Bankr. M.D. Fla. 1990); *In re Yanks*, 49 B.R. 56, 58-59 (Bankr. S.D. Fla. 1985).

[7] *See* Ralph R. Mabey & Annette W. Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 Bus. Law. 697, 703 (1987) ("The Third Circuit's narrow construction of claim is not in keeping with congressional intent to define the term expansively."); *see also* Arlene E. Mirsky, Richard J. Conway & Geralyn G. Humphrey, *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Law. 626, 651-53 (1991); Thomas H. Jackson, *A.H. Robins Co.: Some Observations on Bankruptcy and the Chapter 11 Process*, in 62nd Annual Meeting of the National Conference of Bankruptcy Judges, 76 n.18 (1988).

integrity of the provisions of the Plan of Reorganization and the Consummation Order would have been affirmed.

The "exception" to the bankruptcy principle of finality carved out by the Third Circuit in *Frenville*, *Schweitzer* and *Zulkowski*, and expanded in this case, raises a question of paramount importance for debtors and creditors alike, as well as for all parties participating in environmental cleanup proceedings in which a debtor might be a responsible party under CERCLA in the absence of a bankruptcy discharge. At issue is whether claims based upon acts of the debtor that have not yet matured to a presently assertable cause of action can be disposed of and settled with finality in the bankruptcy reorganization. As the Second Circuit in *LTV* noted on the government's argument that future CERCLA response costs are not yet claims, if the answer is no, it

> might impair the prospects of achieving a viable reorganization, with the result that the debtor, instead of reorganizing, liquidates under Chapter 7 or dissolves under state law, and the assets of the corporation are either unavailable for environmental cleanup costs because such costs are not yet "claims" entitled to pro rata payment, or available only to the limited extent that such costs are considered unaccrued claims for which reserves must be established under state law.

Slip op. at 11, *citing* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 51 (1986); *see also Ohio v. Kovacs*, *supra*, 469 U.S. at 285-86 (O'Connor, J., concurring).

If, on the other hand, such contingent and unmatured interests are "claims," that will surely have an effect on the administration of bankruptcy reorganizations and the distribution of assets and payment of creditors and claimants. Indeed, the United States' argument in *LTV* was in part based upon the perceived difficulties of participating in bankruptcy proceedings on such claims for future CERCLA response costs and the anticipated disputes arising from estimation of such claims.

With respect to previously consummated reorganization proceedings, such as Penn Central's, permitting these claims to proceed now will be at the expense of creditors and claimants who long ago compromised their claims during the reorganization process. *See, e.g., In re Penn Central Transportation Co.*, 42 B.R. 657, 667, 675 (E.D. Pa. 1984), *aff'd*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985); *Duryee v. Erie R.R., supra*, 175 F.2d at 63 ("creditors would not participate in reorganizations if they could not feel that the plan was final; and . . . it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance"). In effect, the government will be given a preference over participants in the plan of reorganization in violation of the absolute priority rule, widely recognized as applicable to § 77 proceedings, that requires each class of claimants to receive full and complete compensation before the next class below may participate at all. *See, e.g., In re Penn Central Transportation Co.*, 596 F.2d 1102, 1110 (3d Cir. 1979). *See also LTV*, slip op. at 20 (the "EPA obviously prefers . . . to keep its CERCLA claim outside of bankruptcy so that it may present it, without reduction, against the reorganized company that it anticipates will emerge from bankruptcy").

The Third Circuit's line of decisions, if permitted to stand, may present risks of enormous costs for many reorganized companies with respect to the imposition of CERCLA liability. Studies show that the average cleanup cost for a site on the National Priorities List is estimated to be $29 million, and it is expected that there will be over 2,000 such sites by the end of this decade, for a total of some $60 billion in cleanup costs. *See* Richard M. Gold & Dennis L. Arfmann, *Government Pursuit of Insurers For Superfund Cost Recovery*, 6 Tox. L. Rep. (BNA) 377, 379, 381-82 (August 21, 1991); *see also* Roger J. Marzulla, *Superfund 1991: How Insurance Firms Can Help Clean Up the Nation's Hazardous Waste*, 4 Tox. L. Rep. (BNA) 685-86 (Nov. 8, 1989) (average cleanup of Superfund site is $25 million, and there are as many as 10,000 major waste sites in the United States). A company which has emerged from bankruptcy

reorganization only to face such liability under CERCLA has hardly received the "fresh start" Congress intended under the bankruptcy laws.

## CONCLUSION

For the reasons stated herein, PCC respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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November 8, 1991

# APPENDIX

Filed September 19, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 90-1676, 90-1677 and 90-1678

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In The Matter of:

PENN CENTRAL TRANSPORTATION COMPANY

Southeastern Pennsylvania Transportation Authority ("SEPTA")
*Appellant* in No. 90-1676

In The Matter of:

PENN CENTRAL TRANSPORTATION COMPANY

Consolidated Rail Corporation,
*Appellant* in No. 90-1677

In The Matter of:

PENN CENTRAL TRANSPORTATION COMPANY

United States of America,
*Appellant* in No. 90-1678

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 70-00347)

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Argued
May 6, 1991
Before: MANSMANN, NYGAARD and RONEY,*
*Circuit Judges.*

(Filed September 19, 1991)

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**OPINION OF THE COURT**

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MANSMANN, *Circuit Judge*.

In this appeal arising out of the complicated and protracted Penn Central Transportation Company ("PCTC") bankruptcy proceedings, we are presented with the issue of whether the United States, Southeastern Pennsylvania Transportation Authority ("SEPTA") and Consolidated Rail Corporation ("Conrail") are precluded by the district court's Consummation Order and Final Decree from seeking recovery for hazardous waste clean-up costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9600 *et seq.*, from the reorganized company, Penn Central Corporation ("PCC"), after the consummation of those proceedings. The district

court found that the United States, SEPTA and Conrail were precluded from bringing their CERCLA claims, and thus denied their petitions seeking leave to sue PCC.

We conclude that the district court erred as a matter of law and that the petitioners *are* entitled to bring their CERCLA claims against PCC because (1) the CERCLA claims were not discharged by the consummation order because the claims were not then in existence and (2) a legal entity still exists against which claims may be asserted because the restructuring of PCTC into PCC under section 77 of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. § 205 (repealed 1978), was not a "liquidation type" reorganization. Our jurisdiction is based upon 28 U.S.C. § 1291 and section 24(a) of the Bankruptcy Act, 11 U.S.C. § 47 (repealed 1978).

I.

PCTC and its corporate predecessor, the Pennsylvania Railroad Company, had owned and operated the Paoli Yard from approximately 1915 through 1976. At the time PCTC filed for reorganization under Section 77 of the Bankruptcy Act on June 27, 1970, polychlorinated biphenyls ("PCBs") had been used at the Paoli Yard for over thirty years. For the next six years, the PCTC Trustees owned and operated the Paoli Yard, and continued to use PCBs on the property.

On April 1, 1976, pursuant to the Final System Plan established under the Regional Rail Reorganization Act of 1973, *see* 45 U.S.C. §§ 716-18, PCTC's Trustees conveyed the Paoli Yard to Conrail; Conrail immediately reconveyed it to the National Railroad Passenger Corporation

("Amtrak"), which has remained its owner until the present time. On that same day, Conrail commenced the operation of a commuter service for SEPTA within the Delaware Valley area, using railroad facilities that included the Paoli Yard.

Two years later, on October 24, 1978 (the "Consummation Date"), the reorganization of PCTC which had begun in 1970 culminated in the district court's issuance of a Consummation Order and Final Decree, which precluded, *inter alia*, future lawsuits against the reorganized debtor, PCC, "on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person . . . may have in, to or against any of the Debtors, the Trustees of the Properties of the Debtors or any of their assets or properties." Consummation Order and Final Decree, ¶ 7.02 (August 17, 1978). But in 1980 Congress passed CERCLA, which imposed retroactive liability on both present and past owners of facilities where hazardous substances, including PCBs, are being or have been released and it is the passage of this statute which forms the crux of these appeals.[1] During these same years, from 1976 through the early 1980's, we note that Conrail continued to provide commuter service for SEPTA until Congress relieved Conrail of that obligation, effective January 1, 1983, in the Northeast Rail Services Act of 1981, 45 U.S.C. § 744a. SEPTA then began to operate its own

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1. The parties do not dispute the fact that Congress intended CERCLA to have retroactive effect. *See, United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986).

commuter service and Conrail discontinued its use of the Paoli Yard.

It was in 1986 that a series of lawsuits was filed in the United States District Court for the Eastern District of Pennsylvania against Conrail, SEPTA, and Amtrak. The suits, including one filed by the United States on behalf of the Environmental Protection Agency, alleged that Conrail, SEPTA and Amtrak had been responsible for the release of PCBs into the environment at the Paoli Yard and in the adjacent residential community since April 1, 1976. Pursuant to CERCLA, the United States sued Conrail, SEPTA, and Amtrak to clean up PCB contamination at the Paoli Yard because of their alleged ownership or operation of the Paoli Yard since April 1, 1976.[2] The United States requested mandatory injunctive relief to remedy PCB contamination and reimbursement of the government's cleanup and related costs.

In June of 1986, Conrail petitioned the United States District Court for the Eastern District of Pennsylvania, which had retained jurisdiction to consider such petitions under its equitable power, for leave to implead PCC in the Paoli PCB cases so that it could assert claims under CERCLA for contribution and indemnity. SEPTA also petitioned for leave to file third-party claims against PCC, and the United States asked for permission to file direct claims against PCC.

On January 14, 1988, the district court issued Memorandum and Order 4311, which resolved

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2. The United States filed its suit because the EPA had determined that the presence of the PCBs at the Paoli Yard presented an imminent and substantial endangerment to the public health or the environment.

many of the issues that had been raised. The district court permitted claims involving direct personal injury and property damage to be brought against PCC and allowed SEPTA and Conrail to pursue third-party claims to the extent that those claims arose out of the personal injury and property damage suits. Additionally, the district court invited briefing on the relevance of the decision of the United States Court of Appeals for the Sixth Circuit entitled, *In re Erie Lackawanna Ry. Co.*, 803 F.2d 881 (6th Cir. 1986).

On August 8, 1990, the district court issued Memorandum and Order 4331, finding that its Consummation Order and relevant principles of bankruptcy law precluded Conrail, SEPTA and the United States from asserting claims under CERCLA against PCC after the Consummation Date. In reaching its decision, the district court stated that it would require an unduly broad reading of our decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir. 1985) – one that it would not undertake – in order to permit the petitioners to proceed against PCC under CERCLA despite PCTC's final discharge in bankruptcy. In addition, the district court viewed the PCTC Reorganization Plan as a "liquidation type" reorganization and, following the reasoning of the court in *Erie Lackawanna*, found that PCC could not be held liable for any claims not listed in the Amended Plan of Reorganization. Because the issues on appeal involve questions of law, we exercise plenary review.

II.

We begin with the general proposition that in the context of bankruptcy "the need for finality and certainty is especially acute." *Taylor v. Freeland & Kronz*, No. 90-3696, slip op. at 12 (3d Cir. July 8, 1991) (*citing Chrysler Motors Corp. v. Schneiderman*, No. 90-6054, slip op. at 8-9 (3d Cir. August 9, 1991)). Nevertheless, despite the fact that the Consummation Order has been entered in the PCTC bankruptcy proceedings, the petitioners urge us to permit them to sue PCC – i.e., to assert claims now against PCC – years after PCTC's discharge in bankruptcy based upon an "exception" to finality which we carved out in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir. 1985). The issue that we addressed in *Schweitzer* was "whether a plaintiff in an asbestos-related personal injury action who had no manifest injury prior to the consummation date of his employer's reorganization in bankruptcy had a dischargeable 'claim' within the meaning of section 77" of the Bankruptcy Act. *Id.* at 939. There, railroad employees brought personal injury claims against the reorganized railroad under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1982), subsequent to the relevant consummation dates of the debtor company. The employees alleged that because their asbestos-related injuries did not become manifest until after the consummation dates, their claims had not been discharged in the bankruptcy proceedings.

In addressing this issue, we first sought to determine whether the employees had "claims" against their employer under the FELA prior to the consummation dates. *Id.* at 941. We reasoned that

for the employees to have had tort causes of action prior to the consummation dates, they would have had to have suffered identifiable, compensable injuries prior to the relevant consummation dates. *Id.* at 942. Under the circumstances presented, we concluded that the subclinical injury resulting from exposure to asbestos was insufficient to constitute the requisite loss or damage to sustain a tort cause of action. *Id.* Therefore, the employees did not have "claims" under the FELA *before* the consummation dates.

We next considered whether the employees had "contingent" claims that they could have asserted against the debtor prior to the consummation dates. We stated that "before one can have an 'interest' which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow." *Id.* at 943. Consequently, because no compensable tort arose under the FELA until the manifestation of an injury, the employees and the employer railroad had "no legal relationship relevant to the plaintiffs' future causes of action in tort from which an 'interest' could flow." *Id.* Moreover, it would be "absurd," we concluded, to expect the plaintiffs, who had not manifested an injury at the time of reorganization, to file claims in the reorganization proceedings. *Id.* Therefore, we held that the plaintiffs' FELA causes of action were not dischargeable claims under section 77.

Our analysis in *Schweitzer* is particularly relevant to the facts before us here. On October 24, 1978, the reorganization of PCTC was consummated and the injunction against the filing of future lawsuits "based upon any right, claim or

interest . . . whatsoever . . . in . . . the Properties of the Debtors" was entered. We note, however, that at the moment of the bankruptcy discharge and the inception of the injunction, CERCLA had not yet been passed by Congress. Indeed CERCLA was not enacted until 1980. Consequently, at the time of the Consummation Order, there was no statutory basis for liability to be asserted against PCTC by the petitioners. Just as the employees in *Schweitzer* had no recognizable tort causes of action under the FELA prior to the employer railroad's relevant consummation dates, the petitioners here could not have brought claims under CERCLA prior to the Consummation Date.

Furthermore, the petitioners did not have "contingent" claims prior to the Consummation Date. In *Schweitzer*, we decided that because no tort claims arose under the FELA until the manifestation of injury, "there was no legal relationship between plaintiffs and defendants relevant to plaintiffs' future causes of action in tort from which an 'interest' could flow." *Id.* at 943. Under the facts now before us in this appeal, it was not until the passage of CERCLA that a legal relationship was created between the petitioners and PCC relevant to the petitioners' potential causes of action such that an interest could flow. Because this legal relationship did not evolve until after the Consummation Date, the petitioners did not have contingent claims against PCTC. Accordingly, our decision in *Schweitzer* leads us to the conclusion that the petitioners' asserted claims under CERCLA did not constitute dischargeable claims within the meaning of section 77 and thus survive the discharge of the debtor.

PCC argues that our analysis in the related case of *In re Penn Central Trans. Co.*, 771 F.2d 762 (3d Cir. 1985) ("*Pinney Dock*"), mandates the preclusion of the petitioners' claims. In *Pinney Dock*, a party was refused permission to pursue an antitrust claim against PCC for alleged violations committed by PCTC before the bankruptcy proceedings but apparently not discovered by the putative claimant until after the reorganization had been consummated. We find that *Pinney Dock*, in fact, supports our conclusion that the petitioners did not have claims before the Consummation Date. The difference between *Pinney Dock* and the appeal before us is simply that in *Pinney Dock* all of the factual and legal elements of the plaintiff's claim existed prior to the consummation of the PCTC bankruptcy. Here, because CERCLA had not yet been enacted, the petitioners lacked this cause of action against PCTC prior to the Consummation Date. Consequently, unlike the antitrust claims sought to be asserted in *Pinney Dock*, the petitioners' CERCLA claims against PCC here could not have been discharged in the PCTC bankruptcy proceedings.

Nonetheless, *Schweitzer* does not answer the question of which party, the original debtor (PCTC) or its successor (the reorganized company PCC), should bear the loss if liability is ultimately imposed. Although we decided in *Schweitzer* that the railroad employees' FELA claims were not discharged in the bankruptcy proceedings, it was not until *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir. 1988), that we identified which entity would be liable if the claims proved to be meritorious. In *Zulkowski*, we held that such

liability would remain with the reorganized company. Accordingly, because the petitioners' claims under CERCLA were not discharged in the PCTC bankruptcy proceedings, the petitioners may bring their post-consummation claims against PCC, and if their claims prove to be meritorious, PCC will bear the CERCLA costs.

III.

In further support of its decision to prohibit the petitioners from bringing their claims under CERCLA against PCC, the district court determined, citing *In re Erie Lackawanna Ry. Co.*, 803 F.2d 881 (6th Cir. 1986), that the PCTC Reorganization Plan was more akin to a liquidation than a reorganization and that no culpable legal entity remained. Because we find that the facts in *Erie Lackawanna* are clearly distinguishable from those before us, we decline to reach the issue of whether *Erie Lackawanna* was decided correctly. *See Zulkowski*, 852 F.2d at 79 n.8. Instead we emphasize, without endorsing or rejecting the decision in *Erie Lackawanna*, that that case involved a rather anomalous fact pattern not susceptible to ready application.

In *Erie Lackawanna*, the plaintiffs brought asbestos-related personal injury actions against a company that had been reorganized under the Bankruptcy Act. As in *Schweitzer*, their injuries did not manifest themselves until after the reorganization had been consummated. Because of the peculiar facts in *Erie Lackawanna*, however, the court then sought to determine whether the restructuring under the Bankruptcy Act was more in the nature of a liquidation than of a reorganization. The court reasoned that if the

restructuring was in reality more similar to a liquidation, no legal entity would remain in existence against which an action could be brought.

When analyzing the case, the court considered the unique facts surrounding the Erie Lackawanna bankruptcy proceedings. Describing the bankruptcy proceeding as a "liquidating plan of reorganization," *Erie Lackawanna*, 803 F.2d at 882, the court quoted from the plan of reorganization: "[t]he general program of activities to be carried on by the Reorganized Company will be to liquidate its remaining assets as expeditiously as practicable." The stated purpose of the bankruptcy was to bring to closure all operations and to dispose of all assets of the company unless 75 percent of the shareholders voted to the contrary. In addition, Erie Lackawanna Inc.'s sole stock holder received nothing under its bankruptcy plan and when Erie Lackawanna Inc. received the proceeds of its valuation case settlement, it was insolvent. Further, in large part, Erie Lackawanna Inc.'s rail assets were conveyed to Conrail and it was only permitted to manage Erie Lackawanna Railways' assets held in a master trust for the benefit of creditors of the Erie Lackawanna Railway. Therefore, based upon these facts, the court determined that the proceedings more closely resembled a liquidation and held that the claims were discharged and warranted the enjoinder of the prosecution of such claims.

Our task then is to determine whether the reorganization here was in the nature of a liquidation such that PCC should not have liability

for PCTC's actions. We begin with the Amended Plan of Reorganization which provided:

> For the purposes of convenience, simplicity and economy in carrying out the Plan and of continuity in the operations of the Debtor [PCTC], the determination has been made *to continue the existence* of the Debtor and to seek to vest in the Debtor ownership or control of the assets or stock of the Secondary Debtors and certain other Leased Lines. It is intended for federal income tax purposes that *the present consolidated group will continue in existence*, with the reorganized Penn Central Transportation Company as the parent company.

(Emphasis added.) The PCTC plan does not provide for PCC's liquidation. In fact, PCC's post-bankruptcy history of acquisitions and long-term growth is completely inconsistent in any way with liquidation: PCC's assets are not held in trust and it continues to engage in a variety of ongoing business operations. PCTC's sole stockholder received ten percent of the new PCC stock issued pursuant to the reorganization plan and when PCC received approximately $2.1 billion in settlement of its valuation case, PCC was able to redeem all outstanding reorganization securities and to increase its common shareholder's equity by approximately $485 million.

Finally, PCTC explicitly represented to the IRS, under oath, that it had no plan or intention to liquidate. Priv. Ltr. Rul. 7828062 (April 14, 1978). Such a representation was needed for PCC to ensure the preservation of its net operating loss carryovers. Consequently, PCC should not now be permitted to claim that its bankruptcy proceeding

was more in the nature of a liquidation than a reorganization.

This issue of whether a reorganization more closely resembles a liquidation or a reorganization also arose in *Zulkowski*. There we concluded that the restructuring of CJI Industries, Inc., was not a "liquidation type" reorganization. We are struck by the many similarities between CJI and PCC. For example, despite the fact that both companies changed their names upon consummation of the bankruptcy proceedings, both continued to acknowledge their links to the railroad companies. Both companies conveyed their railroad assets to Conrail, but retained all other assets. Most importantly, although both companies had conveyed their rail operations, they retained substantial income tax loss carry-forwards relating to the railroads. Thus, on such very similar facts, *Zulkowski* also leads us to conclude that PCC should not be relieved of liability for claims based upon the assertion that its restructuring under the Bankruptcy Act was of a "liquidation type."

IV.

Having determined that the petitioners are entitled to bring their CERCLA claims against PCC, we need not reach the petitioners' due process claim. We will reverse the order of the district court and remand with instructions that the petitioners be permitted to bring their CERCLA claims against PCC.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| In the matter of | : In Proceedings for the Reorganization of a |
| PENN CENTRAL TRANSPORTATION COMPANY, | : Railroad |
| Debtor: | Bky. No. 70-347 |

MEMORANDUM AND ORDER NO. 4331

*Re: Pollution and Toxic Tort Claims*

FULLAM, J. AUGUST 8, 1990

A remaining issue in this litigation is the extent to which liability may be asserted against Penn Central Company ("PCC") (the reorganized company) for environmental pollution and related toxic torts attributable to Penn Central Transportation Company ("PCTC") (the Debtor), notwithstanding the consummation of the reorganization of the Debtor and the injunctive provisions of the Consummation Order of October 24, 1978. By Memorandum and Order No. 4311, entered January 14, 1988, I expressed certain tentative conclusions on this subject, permitted certain personal injury claims to proceed on an interim basis, directed the parties to supply certain supplemental information in the form of written reports, and invited further briefing.

I interpret the materials filed by the United States Government, Conrail and SEPTA as constituting, in part, a motion for reconsideration. They contend, properly in my view, that the issue before the court is not whether the petitioners have potentially meritorious claims for cleanup costs under CERCLA, but rather whether any such claims they may have are precluded by the injunctive provisions of the Consummation Order. This court's retention of jurisdiction under §§ 7.02 and 7.04 of the Consummation Order did not include jurisdiction to decide the merits of proposed lawsuits, but only whether the Consummation Order precludes their assertion.

The pertinent facts are set forth in the Memorandum accompanying Order No. 4311, and will not be detailed here. Briefly, PCB pollution at the Paoli Yard began long before Penn Central Transportation Company entered bankruptcy in 1970, continued until the rail properties were conveyed to Conrail in 1976, and continued under Conrail's ownership thereafter. On October 24, 1978, the Consummation Order was entered, enjoining litigation against PCC "based upon any right, claim or interest of any kind or nature whatsoever which any such person . . . may have in, to or against" the Debtor, PCTC; and enjoining all persons from attempting to proceed against PCC or its property "on account of any obligation" incurred by the Debtor PCTC (¶ 7.02). More than two years later, in December 1980, Congress enacted CERCLA, imposing liability for toxic cleanup costs from, *inter alia*, corporations which had owned the property in question at the time the toxic spillage occurred.

In Memorandum and Order Number 4311, I analyzed the relevant provisions of CERCLA, concluded that the statute did not purport to impose liability upon reorganized companies for preconsummation toxic torts committed by bankrupt debtors, and therefore ruled that the petitioners should not be permitted to assert such claims against PCC. Upon reconsideration, I now agree that Memorandum and Order 4311 purported to deal with the merits of petitioners' claims, rather than their relationship to the Consummation Order.

What I should have said, and now express, is that there is nothing in the language of CERCLA itself which effectively undermines the provisions of the Consummation Order. That is, if the terms of the Consummation Order, properly construed in the light of controlling precedent, bar petitioners' proposed litigation, the CERCLA statute did not purport to change the law in that respect, or to mandate a different result.

In my earlier decision, I sought further clarification as to whether there might remain available some assets of the Debtor, PCTC, which petitioners might look to for payment of their environmental cleanup claims, within the framework of the

Reorganization Plan itself – specifically, surplus funds allocated to creditors but not distributable for one reason or another, or liability insurance coverages. I now conclude, on the basis of the supplemental filings, that it is unlikely that any such source of payment will develop, and that, in any event, these are side issues not directly pertinent to decision of the issues presented by these petitions.

In Memorandum and Order No. 4311, I expressed the view that, unless a different result is compelled by the court of appeals' decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), petitioners' claims would undoubtedly be precluded by the terms of the Consummation Order and firmly established principles of bankruptcy law. I persist in that view.

Petitioners seek to impose liability upon PCC, the reorganized company, for the pre-petition and pre-consummation activities of the debtor.

Section 77(f) of the Bankruptcy Act provides:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall . . . be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and, whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." 11 U.S.C. § 205(f) (repealed 1978).

And that

> "The property dealt with by the plan . . . shall be free and clear of all claims of the debtor, its stockholders and creditors." *Id.*

The statute adopts all-inclusive definitions of the terms "creditors" and "claim":

> "The term 'creditors' shall include, for all purposes of this section, all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act . . ."
>
> "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. § 205(b) (repealed 1978).

As stated by the Supreme Court, "the sweeping, all-inclusive definitions of 'claims' and 'creditors' in § 77 leave room for no exception under it." *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947).

The Consummation Order of October 24, 1978, provided that the Debtor was forever discharged and released from

> "All obligations, debts, liabilities and claims against [PCTC], whether or not filed or presented, whether or not approved, acknowledge or allowed in these proceedings, and whether or not provable in bankruptcy." § 3.06(a).

And that the reorganized company, PCC, received PCTC's property

> "free and clear of all claims, rights, demands, interests, liens and encumbrances of every kind and character, whether or not properly or timely filed and whether or not approved, acknowledged or allowed in these proceedings, of the Debtor, the Secondary Debtors and Penn Central Company, their creditors, claimants and stockholders." § 3.03(a).

Finally, as noted at the outset, § 7.02 of the same Order permanently enjoined all persons from asserting against PCC any possible claim or interest arising out of the activities of PCTC.

Once a reorganization plan has been confirmed and consummated, it cannot be amended. *Duryee v. Erie R.R.*, 175 F.2d 58 (6th Cir.), *cert. denied*, 338 U.S. 861 (1949); *Duebler v. Chernoff Corp.*, 160 F.2d 472, 474 (2d Cir. 1947); *In re Peyton Realty Co.*, 148 F.2d 771, 773 (3d Cir. 1945).

Under these well-settled principles, there is simply no way that the pre-consummation activities of the Debtor could give rise to any kind of claim against the reorganized company unless the Plan so provides.

Although not quarreling with these familiar principles, petitioners contend that the decision of the Third Circuit Court of Appeals in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), mandates that their petitions be granted, so that they can proceed against PCC on their clean-up claims. Although this argument is plausible and not without substance, I believe it reflects an unduly broad reading of the *Schweitzer* opinion, is at odds with other Third Circuit precedent, *In re Penn Central Trans. Co.*, 42 B.R. 657 (E.D.Pa. 1984), *aff'd*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985), and conflicts with the recent decision of the 6th Circuit Court of Appeals in *re Erie-Lackawanna Ry.*, 803 F.2d 881 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 2463 (1987).

In *Schweitzer*, the court ruled that claims for personal injuries occasioned by exposure to asbestos were not discharged in the Reading bankruptcy if the claimants' injuries had not manifested themselves before consummation. The specific holding of the case was that an injured person does not have a "claim" which can be asserted in, or discharged in the course of, a bankruptcy proceeding until the injury has been manifested. In *In re Penn Central Trans. Co., supra*, on the other hand, it was held that potential antitrust claims attributable to the Debtor's activities could not be asserted against the reorganized company, but were barred by the Consummation Order, irrespective of whether the claimants had reason to know of the alleged violations before consummation. These seemingly disparate holdings can perhaps be reconciled on the basis that

*Schweitzer* dealt with FELA claims of injured railroad workers — persons accorded uniquely favorable treatment under the scheme of § 77 of the Bankruptcy Act and the corresponding provisions of the current Bankruptcy Code.

It is noteworthy, too, that the *Schweitzer* court emphasized that its holding was limited to the proposition that latent asbestos-related injuries do not become "claims" which can be discharged in bankruptcy, until the injury manifests itself; the court left open the question whether such claims, arising post-consummation, could be successfully asserted against the reorganized company.

On remand, it is true, the district court interpreted the Third Circuit decision as mandating the conclusion that any claim against the Debtor which was not discharged could necessarily be asserted against the reorganized company. The correctness of this view is called into question by the later decision of the 6th Circuit in *re Erie-Lackawanna Ry., supra*, which holds that, in a reorganization plan substantially equivalent to a liquidation (*i.e.*, where the assets of a railroad are to be liquidated by the reorganized company for purposes of payment of creditors, and the reorganized company will no longer continue in the railroad business), asbestos-related claims first arising after consummation cannot be prosecuted against the reorganized company.

Petitioners argue that, since CERCLA was not enacted until after the Consummation Order, claims for cleanup reimbursement under that statute did not arise, or become "claims", until after consummation, within the *Schweitzer* rubric. It is undisputed, however, that the existence of PCB contamination at the Paoli Yard and the environmental hazards associated with it were manifest, and well known to the petitioners, before the Consummation Order was entered. Although the full extent of the potential damage may not have been appreciated, and although cleanup had not yet been mandated, and the expanded scope of the statutory remedy had not yet been enacted, enough was known to suggest that torts had been and were being committed which could give rise to liabilities.

Finally, I believe the PCTC Reorganization Plan fits the mold of a "liquidation-type" reorganization as discussed in *re Erie-Lackawanna Ry., supra.* The assets of the Debtor were marshalled and redistributed among its creditors and other claimants; the unsecured creditors were paid largely in stock, plus some contingent debt securities – a type of distribution normally associated with an insolvent company; and the reorganized company did not continue in the railroad business, but principally manages its investments. I see no reason not to follow the 6th Circuit precedent established in the *Erie-Lackawanna* case.

Because this case is distinguishable from *Schweitzer* on its facts; because the *Schweitzer* court expressly did not rule on whether the reorganized company could be held liable for the "claims" which were not "discharged"; and in conformity with the appellate decision in *Erie-Lackawanna Ry., supra,* I conclude that the petitions, to the extent not previously granted in Memorandum and Order No. 4311, should be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| In the matter of | : In Proceedings for the Reorganization of a |
| PENN CENTRAL TRANSPORTATION COMPANY, | : Railroad |
| Debtor | : Bky. No. 70-347 |

ORDER NO. 4331

AND NOW, this 8th day of August, 1990, IT IS ORDERED:

Except to the extent heretofore granted in Order No. 4311, all pending petitions for leave to prosecute claims or third-party claims against Penn Central Corporation (PCC) on account of environmental pollution alleged to arise from the property and activities of the Debtor, Penn Central Transportation Company (PCTC) prior to October 24, 1978, are DENIED.

/s/ John P. Fullam
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|
| In the matter of | : In Proceedings for the Reorganization of a |
| PENN CENTRAL TRANSPORTATION COMPANY, | : Railroad |
| Debtor: | Bky. No. 70-347 |

*Re: Pollution and Toxic Tort Claims*

MEMORANDUM AND ORDER 4311

FULLAM, Ch. J. JANUARY 14th, 1988

Several petitioners seek leave to sue Penn Central Corporation (PCC), on account of the activities of the Debtor, Penn Central Transportation Company (PCTC) during its ownership and operation of a rail yard in Paoli, Pennsylvania.

I.

The relevant facts are largely undisputed. Where there may possibly be lingering controversy, I will assume the truth of petitioners' allegations.

The Paoli Railroad Yard in Chester County, Pennsylvania is a 23-acre facility about 15 miles west of Philadelphia. There, since the 1930s, PCTC and one of its predecessors (the Pennsylvania Railroad Company) used and serviced transformers that contained polychlorinated biphenyls (PCBs). These chemicals leaked or were dumped into the Railroad Yard.

Beginning in the mid-1960s and to a greater extent as time went on, such soil contamination has been recognized as hazardous. *See Environmental Defense Fund v. Environmental Protection Agency*, 598 F.2d 62, 65-71 (D.C. Cir. 1978). However, PCBs found their way into the soil at Paoli Yard throughout PCTC's ownership of the tract, and apparently for some time thereafter. Meanwhile, during the early 1970s, mounting

evidence documenting PCBs' toxicity caused public and governmental pressure to reduce the danger. *Environmental Defense Fund*, at 66 & n.4 (citing a 1972 report by a Federal Interagency Task Force, "Polychlorinated Biphenyls and the Environment"). For its part, the Environmental Protection Agency (EPA) began promulgating protective regulations. *E.g.*, 38 Fed. Reg. 24342, 24343 (Sept. 7, 1973) (PCBs included on list of toxic water pollutants); 38 Fed. Reg. 35388, 35395 (Dec. 27, 1973) (proposed effluent standards for PCBs); *see also* 37 Fed. Reg. 5705 (Mar. 18, 1972) (Food and Drug Administration proposed rule on PCBs in food); 38 Fed. Reg. 18096 (July 6, 1973) (final rule). Although the initial regulatory effort stalled, *see Environmental Defense Fund*, 598 F.2d at 68-69 & nn. 17-20, investigators continued developing the evidence, including the evidence of adverse effects caused by PCBs in electric rail equipment, *see, e.g., id.* at 70 (noting EPA's commissioned survey of the scientific literature on PCBs and its sponsorship of a national conference on PCBs in November 1975).

These problems were directly related to the Paoli Yard when, among several widely-publicized PCB-related accidents, on April 16, 1974, a train running between Philadelphia and Paoli spilled a substantial quantity (10 to 100 pounds) of PCBs. *See* Boyle, "The Spreading Menace of PCB," *Sports Illustrated* 20 (Dec. 1, 1975); Star, "American and Japanese Controls on Polychlorinated Biphenyls," 1 *Harv. Envir. L. Rev.* 561, 564 n. 29 (1976). However, neither this particular incident nor the general PCB problem surfaced in the course of the bankruptcy litigation process.

Similarly and more importantly, when drafting a federal program to save northeastern and midwestern railroad systems from extinction legislators did not explicitly consider the significance of PCBs at railroad yards. Thus, responsibility for PCB cleanup nowhere was specified in the Regional Railroad Reorganization Act of 1973 (Rail Act), 45 U.S.C. § 701 *et seq.*

Under the Rail Act, 45 U.S.C. § 743(b), essentially all PCTC's rail-related properties were transferred on April 1, 1976, to the statutorily-created (45 U.S.C. § 741 *et seq.*) Consolidated Rail Corporation (Conrail); Conrail, the same day, granted the statutorily-created (45 U.S.C. § 501 *et seq.*) National Railroad Passenger Corporation (AMTRAK) title (but retained an easement) to the Railroad Yard. As compensation, pursuant to the Rail Act, 45 U.S.C. § 716(d)(1), PCTC obtained an entitlement to Conrail securities and government-guaranteed certificates of value, with value to be calculated during later, statutorily-authorized (45 U.S.C. § 746(c)(4)), valuation proceedings.

Meanwhile, EPA's regulatory effort proceeded apace. *See, e.g.*, 41 Fed. Reg. 14134 (April 1, 1976) (recommended procedures for disposal of PCB-contaminated waste); 41 Fed. Reg. 30468 (July 23, 1976) (proposed effluent standards for PCB discharges); 42 Fed. Reg. 6532 (Feb. 2, 1977) (final effluent standards for PCB discharges, more stringent than those proposed). New legislation enacted in October 1976, the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.*, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, gave EPA new power to regulate. In particular, see 15 U.S.C. § 2605(e), singling out PCBs for strict and expedited regulation.

Thus, by the mid-1970s, the federal government knew of the potential for substantial PCB pollution at railroad yards where electric power transformers had been serviced or disposed. *See also* Council on Environmental Quality, *Seventh Annual Report* 44-46 (1976) (describing PCB pollution and linking it to railroad companies' use of large capacitors and transformers); 43 Fed. Reg. 24802, 24808 (June 7, 1978) (discussing PCB-containing fluid in transformers on locomotives operated by AMTRAK, Conrail, and other transit companies, noting that these PCBs regularly escape to pollute the environment). In March 1978, "for the purpose of assessing the current and future use of PCB at railroad yards," four EPA representatives visited the Paoli site and others in the northeast corridor. (Letter from United States Attorney Edward S.G. Dennis, Jr., Oct. 1, 1986).

On March 17, 1978 this court approved the PCTC reorganization plan. *In re Opinion Approving Plan of Reorganization (In re PCTC)*, 458 F. Supp. 1234 (E.D.Pa. 1978) (later history omitted, decision essentially affirmed, *certiorari* denied). On August 17, 1978, in the Consummation Order and Final Decree (no party having mentioned PCBs in any filing), this Plan was confirmed and submitted for consummation on October 24, 1978. *In re Confirmation and Consummation of Plan of Reorganization (In re PCTC)*, 458 F.Supp. 1364 (E.D.Pa. 1978) (later history omitted, decision essentially affirmed, *certiorari* denied).

In November 1978, EPA again visited and investigated PCB pollution at the Paoli Yard. The agency found that the use and disposal of PCBs violated then-current TSCA regulations.

This finding was communicated to Pennsylvania's Department of Environmental Resources (DER). DER evaluated the Railroad Yard, making five site visits from April through June, 1979. On June 28, 1979, DER ordered Conrail, AMTRAK, and the Southeastern Pennsylvania Transportation Authority (SEPTA) to clean up the PCBs. Enforcement of this order was opposed by Conrail, AMTRAK, and SEPTA, at least one appeal filed, and little if any cleanup done before, on January 30, 1986, the Valley Forge Chapter of Trout Unlimited brought a citizens' suit in this district (Civil Action No. 86-595) to force cleanup of the Railroad Yard.

Meanwhile, the pending litigation to determine the amounts to be paid for PCTC's rail assets (and its related Tucker Act claims), were amicably settled (with no reference to PCB pollution) in an agreement dated November 16, 1980.

The agreement, in § 4.04, provided for releases of claims by PCC and the Government Parties, the United States and the United States Railway Association. PCC released "all claims . . . against . . . either of the Government Parties or any Transferee [of Rail Property], under . . . any . . . rule of law, whenever arisen or arising, whether for compensation or damages or other relief, . . . on account of — (a) the transfer or conveyance . . .

of any . . . interest in Rail Properties . . . to Conrail . . .; (b) transportation operations, before or after April 1, 1976, . . .; (c) restrictions imposed by the Rail Act on the termination of rail services . . . or on the abandonment of any Rail Properties . . .; [and] (e) . . . the form of consideration provided for in the Rail Act." The Government Parties released "any claim that the terms of transfer or conveyance of Rail Properties by [PCTC] . . . were more fair and equitable than required as a constitutional minimum," a rather inartful release of claims that the government paid more than it was required to under the Rail Act and the Constitution. Both releases had exclusions not relevant here.

Throughout the period of the negotiations concerning valuation, in an immense federal effort that made daily headlines, Congress was directly confronting the problems caused by the dearth of federal and state laws to combat pollution in general and PCB pollution problems in particular. Eventually, in December 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*

On January 1, 1983, having previously entered into an operating agreement for the Paoli Yard under the Rail Act, 45 U.S.C. § 744(e), SEPTA took over commuter rail operations at the Yard. In 1984 and 1985, EPA and DER removed local soil and water samples that revealed significant PCB pollution.

This led to the above-mentioned Trout Unlimited lawsuit, and then to more lawsuits in this District, including:

> *United States v. SEPTA et al.*, Civil Action No. 86-1094, seeking an injunction and clean-up costs under CERCLA, RCRA, and TSCA;
>
> *Brown et al. v. SEPTA et al.*, Civil Action No. 86-2229, a purported class action (class certification denied) on behalf of persons who, having lived, worked, or owned or rented real property near the Railroad Yard

since 1975, seek damages and injunctive relief under CERCLA, TSCA, and Pennsylvania law;

*Burrell et al. v. SEPTA et al.*, Civil Action No. 86-2235, an individual action, similar to *Brown*;

*Cohen et al. v. SEPTA et al.*, Civil Action No. 86-4037, a purported class action (class certification denied) on behalf of people and businesses that, being near the Railroad Yard, seek damages and injunctive relief under CERCLA, TSCA, and Pennsylvania law;

*Narcise et al. v. SEPTA et al.*, Civil Action No. 87-1190, an individual action, similar to *Brown*, including claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*; and

*Williams et al. v. SEPTA et al.*, Civil Action No. 87-1258, a purported class action similar to *Narcise*.

In all these cases, and in several related cases, defendants include AMTRAK and Conrail, as well as SEPTA.

SEPTA and Conrail now seek to bring third-party actions for contribution or indemnification from PCC; plaintiffs in the above-named cases seek to bring direct actions against PCC. All these proposed actions require leave of this Court to proceed because, in ¶ 7.02 of the Consummation Order, I permanently enjoined the prosecution of lawsuits against PCC based on obligations of PCTC or PCTC's Trustees, and in ¶ 7.04 of the same order provided that the injunction would be lifted upon application in appropriate cases.

II.

The Burrell petitioners, and perhaps others, allege that they wish to pursue claims based upon the post-consummation activities of PCC itself — claims, for example, that PCC, after coming into existence on October 24, 1978, tortiously concealed

information about the PCB pollution at the Paoli Yard. Since the Consummation Order does not purport to preclude litigation against PCC for its own conduct, petitioners do not need this court's permission to proceed with such litigation. Whether such claims can be asserted without doing violence to Federal Rule of Civil Procedure 11 is not for this court to say.

III.

There can be no doubt that the Consummation Order was intended to exonerate PCC from all claims in the categories of claims now being asserted in this proceeding. In accordance with normal bankruptcy practice, the reorganized company was to start with a clean slate, with only such liabilities and responsibilities as were inherent in the carefully structured Plan of Reorganization. And the Plan, in turn, was intended to achieve the compromise adjustment of a host of conflicting claims, giving to each its proper place in conformity with the absolute priority rule. The participants in the Plan proceedings would have been astonished to learn that there was or could be any group of claimants whose entitlements were not dealt with in or disposed of by the plan, and might survive the Consummation Order.

In the meantime, however, the Court of Appeals for the Third Circuit has decided, in *Schweitzer v. Consolidated Rail Corp.*, 558 F.2d 938 (3d Cir. 1985), that an FELA claim for asbestos-related injury which did not become manifest until after the Consummation Order in the Reading reorganization was not discharged by that Order. The court took the position that a claim for personal injury does not accrue until the injury has become manifest, and that the only "claims" which can be discharged are those which have accrued. The court cited with approval the decision of the Fifth Circuit Court of Appeals in *Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367 (5th Cir. 1984), to the effect that, for purposes of bankruptcy discharge, a products liability claim does not exist until the injury-producing accident has occurred.

To state that a claim is not discharged does not, of course, necessarily mean that there is an entity which can still be held legally liable to pay the claim, or that there are assets which may lawfully be looked to as a source of payment. In *In re Erie Lackawanna Ry. Co.*, 803 F.2d 881 (6th Cir. 1986), *rehearing denied* (1987), the Sixth Circuit Court of Appeals held that, if the § 77 debtor's plan of reorganization is a liquidation plan, *Schweitzer*-type asbestos claims which arose after confirmation could not be asserted against the reorganized successor of the § 77 debtor. On the other hand, in the *Schweitzer* case itself, my colleague Judge Ditter eventually determined that *Schweitzer* could proceed against the reorganized company.

Although the PCTC Reorganization Plan is much more complicated than either the Erie or the Reading plan, it bears many features which, under the Sixth Circuit's analysis in *Erie Lackawanna*, would militate against successorship liability. For example, unsecured creditors under the PCTC Plan received contingent debt securities in the amount of 30% of their claims, and stock for the balance of their claims. This form of distribution to unsecured creditors is normally associated with an insolvent company, and the mere fact that some of PCTC's assets passed to a new firm to be managed in the future would not necessarily justify a result different from that reached in the *Erie Lackawanna* case.

In addition to the successorship issues, there is room for the argument that, even if PCC bears no successorship liability, it would be inequitable not to make available to postconsummation personal injury claimants like these petitioners any undistributed PCTC assets which, under the terms of the Plan, were available for creditors, but which have not been needed for that purpose.

Notwithstanding the extensive briefing which has already occurred, and the inordinate delays in deciding this matter, the present record does not permit a definitive resolution of all aspects of the pending controversy. Although the parties have extensively discussed the *Schweitzer* case, they have not briefed

the implications of the *Erie Lackawanna* decision, nor analyzed the PCTC Plan in light of that decision. And the facts concerning the amount of undistributed assets, if any, are not a matter of record.

I have therefore concluded that the parties should be invited to supplement the record in these respects. In the meantime, however, given the *Schweitzer* decision and the likelihood that at least some assets may be available as a fund for the payment of successful claimants, all of the petitioners will be permitted to pursue claims against PCC for personal injuries (including wrongful death), subject to certain conditions discussed below.

IV.

Before detailing the limitations on petitioners' right to proceed with personal-injury claims, it is appropriate to address the various other kinds of claims being asserted.

A.

All of the petitioners seek to pursue claims under CERCLA, including, variously, cleanup expenses, relocation costs, and compensation for personal injuries and property damage. In my view, however, PCC cannot be held liable under CERCLA for PCTC's alleged pollution; hence, no useful purpose would be served in permitting such suits to proceed.

CERCLA was not enacted until after PCTC's ownership and operation of the Paoli Yard came to an end, by operation of law. The statute carefully specifies the various types of entities potentially liable under that statute, in 42 U.S.C. § 9607(a), including:

> (1) The owner and operator of . . . a facility [such as the Paoli Yard],

> (2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

PCC does not fit within any of these definitions. The second category listed above does apply to PCTC, or would have if PCTC had still been in existence when the statute was passed. CERCLA creates retroactive liability for toxic waste disposal, *see Developments in the Law "Toxic Waste Litigation"*, 99 Har.L.R. 1458, 1539-42 and n. 123 (1986) and is constitutional. *Id.* at 1555-65 and n. 69 (collecting cases). But the statute does not, at least expressly, purport to impose liability upon the reorganized successors of bankrupt former owners of pollution sources. And it would seem that, in the absence of some express statutory provision to that effect, a court should not readily assume that Congress intended any such result, which would be so disruptive of the scheme of the bankruptcy statutes and the expectations of the parties to bankruptcy proceedings.

Some further indication that Congress did not intend to create such retroactive liability can be derived from more recent legislation, the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). In that statute, in redefining the term "owner or operator", with respect to "any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of state or local government", Congress included for potential liability "any person who owned, operated or otherwise controlled activities at such facility immediately beforehand" but did not include the reorganized successor of any such person. P.L. No. 99-499, § 191(b)(2), 100 Stat. 1615 (1986) (codified at 42 U.S.C. § 9601(2)(A)(iii)). The previous version of the definition did not refer to conveyance "due to bankruptcy". When, as in the SARA amendments, Congress explicitly legislates on the subject of bankruptcy, it is reasonable to suppose that Congress has in mind the distinctions between the debtor and a reorganized successor. Thus, the failure to impose liability upon reorganized successors is a strong signal of Congressional intent.

And finally, it seems clear that the imposition of CERCLA liability is not required by the *Schweitzer* decision, directly or by analogy. *Schweitzer* dealt with liability-producing conduct of the debtor, which, after consummation, produced a noticeable injury. CERCLA involves activity of the debtor which was not potentially liability-producing (in the CERCLA sense) at the time it occurred, but which, after consummation, as a result of a change in the law, is deemed to have generated liability retroactively.

B.

*Claims under the Toxic Substances Control Act (TSCA).*

The Burrell petitioners, and perhaps other claimants who have adopted the Burrell assertions by reference, wish to pursue claims under the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* These claims have not been briefed, and may have been abandoned. In any event, they patently lack merit, and should not be pursued. The statute was enacted after PCTC's ownership and operation of the Paoli Yard had terminated by operation of law. Thus, there could be no possible TSCA liability unless the statute imposed such liability retroactively. On the contrary, the statute expressly provides, 15 U.S.C. § 2605(e)(2)(A) that "effective one year after January 1, 1977, no person may manufacture, process, or distribute in commerce or use any polychlorinated byphenol in any manner other than a totally enclosed manner." Neither PCTC nor PCC could possibly have violated this statute. Such claims will therefore not be permitted to proceed.

C.

*Claims of the United States, Conrail, SEPTA and Amtrak*

For convenience, the claims of Conrail, SEPTA and Amtrak will be referred to herein as the claims of Conrail (those of Amtrak and SEPTA being derivative therefrom).

To the extent that any party claiming damages for personal injury (including wrongful death) is now being permitted to sue PCC, the Conrail parties will be permitted to assert third-party claims for contribution.

To the extent that the Conrail parties wish to sue PCC for contribution or indemnity under the federal statutes discussed above, for the reasons already mentioned, such litigation will not be permitted to proceed.

In addition to these two kinds of claims, however, the Conrail parties seek to hold PCC liable, either directly or for contribution or equitable indemnity, for cleanup expenses and other forms of economic injury. The precise legal theory or theories upon which these claims are based are somewhat elusive. When PCTC owned and operated Paoli Yard, it was spilling PCBs. PCTC conveyed the property to Conrail on April 1, 1976, and Conrail continued to spill PCBs thereafter. Both before and after the conveyance, the condition of the property was visible to all, and the existence of a PCB problem was certainly known to both sides.

If PCTC had been an ordinary private party, and had simply sold the property to Conrail as a private purchaser, would the fact that Conrail later incurred cleanup expenses and other liability relating in part to the preconveyance pollution give rise to any claim against PCTC? Under normal conveyancing law, the likelihood seems remote.

The possibility of any such claim being successfully pursued is certainly not enhanced by the fact that, instead of a private conveyance, the transfer to Conrail was the product of an exercise of eminent domain power by the United States Government. I am aware of no basis for suggesting that a party whose property has been condemned and paid for can later be held liable to the condemning authority for the pre-condemnation condition of the property.

In addition, the parties have failed to address the possible impact of the agreement settling the Valuation Case, and the releases which were exchanged in conjunction with that settlement. Apart from the CERCLA and TSCA statutes – which are unavailing here, as discussed above – it would seem that all of the claims of the Conrail parties may be simply a belated assertion that the Paoli Yard was worth less than PCTC was paid for it. If so, it is difficult to see how such a claim could survive the Valuation Case settlement.

Because of the potential magnitude of Conrail's claims, and because the issues have not been adequately addressed, I will permit further briefing on the subject. In the meantime, however, I am not persuaded that the proposed litigation should be permitted to proceed, insofar as the claims of the Conrail parties are not predicated upon personal injury or wrongful death of third parties.

D.

*Claims for Punitive Damages*

Some of the petitioners may wish to prosecute claims against PCC for punitive damages. Given the fact that the PCB problem was just beginning to be recognized at about the time PCTC's involvement in the railroad business was drawing to a close, and that no express statutory regulation existed at that time, it seems highly unlikely that PCTC itself could have been subject to a punitive-damage award. Be that as it may, however, I perceive no realistic basis, under Schweitzer or otherwise, for suggesting that PCC could properly be subjected to punitive damages in its alleged successorship role.

E.

*Claims for Damage to Adjacent Properties*

Some of the petitioners wish to pursue claims for physical damage to adjacent properties by reason of the seepage of PCBs

from the Paoli Yard beyond its borders. Obviously, as a predicate for possible liability of PCTC or its alleged successor, PCC, it would have to appear that the damage was caused by PCBs unleashed before April 1, 1976. And it would also have to be shown that the seepage to adjacent properties was not visible, and could not have been discovered with reasonable diligence, before October 24, 1978, and that suit is not time-barred.

In *In re Penn Central Trans. Co. (Petition to Pursue Antitrust Claims)*, 771 F.2d 762 (3d Cir 1985), the Court of Appeals upheld this court's determination that certain antitrust claims were barred by the Consummation Order, notwithstanding claimants' assertion that they did not know of the existence of such claims until after the Consummation Order. The court, distinguishing *Schweitzer*, held that claimants' "claims" accrued when the defendant's conduct caused them an injury (rather than when they may have appreciated the legal theory supporting a lawsuit).

Unlike the personal injury claims discussed above, a claim for damage to adjacent property must be deemed to have accrued whenever the fact of seepage or spillage upon the adjacent property was manifested, regardless of whether the claimant then appreciated the nature and extent of the harm.

On the other hand, it is conceivable that all of the seepage complained of occurred underground and was not reasonably discoverable before the consummation date. Claims in that category will be permitted to proceed, on the same basis as the claims for personal injury.

V.

*LIMITING CONDITIONS*

To the extent that litigation is being permitted against PCC at this time, the parties will be required to use their best efforts to structure the outcome of such litigation, whether by verdict or settlement, in such a way as to allocate specifically the amount

of damages attributable to pre-April 1, 1976 discharge of PCBs. In the absence of such allocation, this court will, upon application, undertake to determine the appropriate allocation.

As discussed above, litigation will be permitted to proceed only on theories of common-law tort, and only for compensatory damages.

Finally, enforcement of any judgments or other form of award will be stayed, pending further order of this court.

An Order embodying these conclusions will therefore be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| In the matter of | : In Proceedings for the Reorganization of a |
| PENN CENTRAL TRANSPORTATION COMPANY, | : Railroad |
| Debtor: | BKY. NO. 70-347 |

ORDER NO. 4311

AND NOW, this 14th day of January, 1988, upon consideration of the petitions of the respective plaintiffs, Conrail and SEPTA concerning the amenability of PCC to suit stemming from alleged PCB pollution at the Paoli Railroad Yard, it is ORDERED:

1. That, subject to the conditions and limitations set forth below, litigation to recover compensatory damages for personal injuries (including wrongful death) allegedly caused in whole or in part by exposure to PCBs released or discharged before April 1, 1976 may proceed against Penn Central Corporation, until further Order of this court, if such claim did not accrue before October 24, 1978.

2. Claims for compensatory damages for property damage to adjacent properties occasioned by the pre-April 1, 1976 discharge of PCBs at the Paoli Yard may likewise be pursued against PCC if the infiltration of PCBs to such adjacent property was not, and in the exercise of due diligence could not reasonably have been, known prior to October 24, 1978.

3. Suits in the above two categories may be maintained against PCC, either directly, or by way of third-party actions for contribution.

4. Potential recoveries from PCC in any such litigation will be limited to the damages properly allocable to PCB releases which occurred before April 1, 1976; the necessary allocation

will be performed by this court, upon application. Claims for punitive damages may not be pursued against PCC.

5. Enforcement of any judgments or other recoveries, whether by execution or otherwise, is stayed, until further Order of this court.

6. Except as specifically provided above, ruling on the pending petitions is deferred, pending further supplementation of the record, as follows:

a. Interested parties are directed to file supplemental briefs (which may include evidentiary submissions), within forty-five (45) days, addressing the implications of *In re Erie Lackawanna Ry., Co.*, 803 F.2d 881 (6th Cir. 1986) and the Settlement Agreement in the Valuation Case and release documents, together with any additional issues they see fit to present.

b. PCC shall, within forty-five (45) days, submit a report showing the amounts, if any, of assets of PCTC set aside under the Reorganization Plan for distribution to creditors, but not needed for that purpose, and disclosing whether any of the claims sought to be asserted by petitioners would be covered by liability insurance.

/s/ John P. Fullam

Ch. J.